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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [redacted] 3

GATH P. FREEMAN, Trustee under the Will and of the Estate of Henry C. Starr, Deceased,

Appellant,

vs.

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

Gath P. Freeman,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
1. Form and nature of action	2
2. Statute sustaining jurisdiction	4
3. State statute involved	4
Regulations, Gross Income Tax Division	8
4. The opinion below	10
5. Finality of the judgment	10
6. Timely application for appeal	12
7. Origin of Federal questions and rulings of Courts below	12
8. Federal questions necessarily decided	23
9. Highest Court is the Supreme Court	23
10. Federal questions are substantial	23
Appendix A—Opinion of the Supreme Court of Indiana	29

Table of Cases.

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, 58 Sup. Ct. 913 (1938)	21, 25
Allied Mills, Inc., v. *Department of Treasury* (1943), 63 Sup. Ct. 666	21, 25
Andrews v. *Montgomery-Ward & Co.* (1939), 30 Fed. Sup. 380	26
Blodgett, Tax Commissioner of the State of Conn. v. *Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410	22
Buck v. *Beach* (1906), 205 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732	22
Bracey v. *Dars* (D. C.) (1914), 218 Fed. 482	27
Bryant v. *Zimmerman*, 278 U. S. 62, 67	28
Champion v. *Ames* (1903), 23 Sup. Ct. 321	27
Citizens Bank of Michigan City, Ind., v. *Opperman*, 249 U. S. 448, 449	12

Page

Crew Levick Co. v. *Commonwealth of Pennsylvania* (1917), 245 U. S. 292, 38 Sup. Ct. 126 26
Croop v. *Walton* (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386 22
Curless v. *Watson*, 180 Ind. 86, 92-93 23
Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. E. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162 22
Dahnke-Walker Milling Co. v. *Bondurant* (1921), 257 U. S. 282 26
Electric Bond & Share Co. v. *Securies and Exchange Commission* (1937), 92 F. (2d) 580, 588 ..... 25, 26, 27
Ex parte France, 176 Ind. 72, 80-81 23
Furst v. *Brewster*, 51 Sup. Ct. 295 26
Galveston H. & S. A. Ry. Co. v. *Texas* (1907), 210 U. S. 217, 28 Sup. Ct. 638 26
General Motors Acceptance Corp. v. *Huron Finance Corp. et al.* (1935), 262 N. W. 195 ..... 24, 26, 27
In re Globe Varnish Co. (1940), 114 Fed. (2d) 916, 312 U. S. 690 25
Gwin, White & Prince, Inc. v. *Henneford, et al.* (1938), 59 Sup. Ct. 325, 305 U. S. 434 25
Holland Furnace Co. v. *Department of Treasury* (1943), — C. C. A. —, 133 F. (2d) 212 22
Industrial Acceptance Corp. v. *Hearing* (1929), 253 Ill. App. 97 27
Jones v. *Securities and Exchange Commission* (1935), 79 F. (2d) 617, 619 27
Lynch v. *New York ex rel.*, 293 U. S. 52, 54 23
McGoldrick, etc., v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 60 Sup. Ct. 388, 394 26
Miami Coal Co. v. *Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333 22
O'Kane v. *State* (1940), 28 N. E. (2d) 905 ..... 22, 27
Oklahoma-Texas Trust v. *Securities and Exchange Comm.* (1939), 100 F. (2d) 888 27
Parey v. *Bache* (1942), 125 F. (2d) 493 27
Penn. R. Co. v. *Clark* (1915), 238 U. S. 456 26
Penn. R. Co. v. *Soman Shaft Coal Co.* (1916), 242 U. S. 120 26

Page

Postal Telegraph Cable Co. v. *Adams* (1895), 155 U. S. 688, 695, 15 Sup. Ct. 268 26
Securities and Exchange Commission v. *Bailey* (1941), 41 Fed. Supp. 647 27
Securities and Exchange Commisison v. *Payne* (1940), 35 Fed. Supp. 873 27
Securities and Exchange Commission v. *Torr* (1936), 15 Fed. Supp. 315 27
Securties and Exchange Commission v. *Tung Corp.* (1940), 32 Fed. Supp. 371 27
Sioux Remedy Co. v. *Cope* (1914), 235 U. S. 197 26
State Freight Tax (1872), 15 Wall. 232, 277 (21 L. Ed. 146) 26
Stockard v. *Morgan* (1901), 185 U. S. 27, 22 Sup. Ct. 576 26
Texas & N. O. R. Co. v. *Sabine Tram Co.* (1913), 227 U. S. 111 26
Union Refrigerator Transit Co. v. *Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36 22
United States v. *Ohio Oil Co.* (1913), 234 U. S. 548 26

OTHER AUTHORITIES.

36 Illinois Law Review, 727-746 (March, 1942, see pages 738-9) 26

STATUTES.

Constitution of Indiana, Article 7:
Section 1 23
Section 5 7
Constitution of the United States, Article I, Section 8 3, 13
Indiana Acts 1881 (Spec. Sess.), Chap. 38, Section 650, p. 240 11
Indiana Acts 1933, Chap. 50, p. 388, as amended by Indiana Acts 1937, Chap. 117, p. 604 4
Burns Indiana Statutes Annotated 1933, Sec. 2-3236 11
Burns Indiana Statutes Annotated 1933:
Sec. 64-2601 (as amended 1937) 4
Sec. 64-2602 (as amended 1937) 6

	Page
Sec. 64-2603 (as amended 1937)	7
Sec. 64-2606 (as amended 1937)	7
Sec. 64-2613 (as amended 1937)	8
Judicial Code, Section 237 (a)	4, 12
Rule 12 (1) of the Supreme Court of the United States	1
U. S. C., Title 28:	
Section 344 (a)	4
Section 350	12
Section 861 (a)	4
Section 861 (b)	4
Regulation 3900, Gross Income Tax Division	8
Regulation 1212, Gross Income Tax Division	9
Regulation 100, Gross Income Tax Division	9
Rule 7, Gross Income Tax Division	10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 788

GATH P. FREEMAN, TRUSTEE UNDER THE WILL AND OF THE ESTATE OF HENRY C. STARR, DECEASED,
Appellant,

vs.

GILBERT K. HEWIT, DIRECTOR OF GROSS INCOME TAX DIVISION, DEPARTMENT OF TREASURY, STATE OF INDIANA.
Appellee.

ON APPEAL FROM THE SUPREME COURT OF INDIANA.

STATEMENT AS TO JURISDICTION.

Pursuant to paragraph 1 of the Rule 12 of the rules of the Supreme Court of the United States, the appellant [1],

[1] Note: The said Gath P. Freeman, as Trustee aforesaid, was plaintiff in the trial court, appellee in the Supreme Court of Indiana, and is appellant in this appeal to the Supreme Court of the United States. The said Gilbert K. Hewit, as Director aforesaid, was defendant in the trial court, appellant in said State Supreme Court, and is appellee in this said appeal.

In this Statement as to Jurisdiction (except quotations) "appellant" always refers to said Gath P. Freeman, as Trustee aforesaid, and "appellee" always refers to said Gilbert K. Hewit, as Director aforesaid.

submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

1.

Form and Nature of Action.

Appellant brought this suit against appellee, as taxing officer of the State of Indiana to recover the sum of $652.14 gross income tax imposed and collected by appellee from appellant on account of gross receipts of appellant from sales of certain intangibles, corporate stocks and bonds, of appellant by him sold and delivered in the year 1940 in interstate transactions to persons who were residents of other States of the United States, the appellant being domiciled in and a resident of Indiana and said sales having been made through the New York Stock Exchange in the usual and customary way and in accordance with the rules and regulations of said Exchange. The appellant paid said tax under protest and filed a claim for refund thereof with the appellee, who denied and refused said claim for refund, and thereafter the appellant brought this suit to recover the amount of said tax so paid. It is shown in the stipulation of facts that all steps necessarily precedent to the institution of said action had been taken by appellant and appellee (R. 46).

The appellant filed his complaint in said action in the Wayne Circuit Court of Indiana on the 27th day of January, 1942. The appellee appeared by counsel, the Attorney General of Indiana, and on the 21st day of February, 1942, filed answer to the complaint in said cause. On February 18, 1943, said cause was submitted to the court for trial, finding and judgment on said stipulation of facts and certain documents introduced in evidence, and briefs were submitted by the parties by way of argument. On March 26,

1943, the trial court entered judgment in favor of the appellant for the recovery of said sum of $652.14, with interest thereon, and costs, representing the amount of said tax so imposed and collected by the appellee (R. 23).

The only ground alleged in the complaint for the recovery of said tax are the averments that each and all of said sales of stocks and bonds were transactions in interstate commerce and were exempt from the payment of gross income tax to the State of Indiana and that the gross income tax charged and collected therefor or on account thereof constituted a regulation of and a burden upon commerce between the State of Indiana and the State of New York or other States of the United States in conflict with Article I, Section 8 of the Constitution of the United States (R. 12-13). The appellee joined issue thereon by his answer to the complaint (R. 18). While the judgment of the trial court is general in form, for the recovery of said tax, interest and costs, with no special findings of fact or conclusions of law, said court necessarily passed upon said Federal question in finding that the allegations of appellant's complaint were true and in rendering judgment accordingly in favor of the appellant for the recovery of said tax (R. 22). For further statement in this respect see discussion under "Origin of Federal Questions and Rulings of Courts Below", *infra*.

It appears from the stipulation of facts that the appellee, Gilbert K. Hewit, is the Director of Gross Income Tax Division, Department of Treasury of the State of Indiana, and was duly designated by the Governor of said State of Indiana as such Director and as the Chief Administrative officer charged with the administration and enforcement of the Indiana Gross Income Tax Act of 1933, and the acts amendatory thereof and supplemental thereto (R. 39).

2.

Statute Sustaining Jurisdiction.

The statutory provision believed to sustain jurisdiction of the Supreme Court of the United States is Section 237 (a) of the Judicial Code, as amended, reading, to the extent relevant here, as follows:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *" (Act of Congress Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937, 28 U. S. C. Sec. 344 (a).)

The remedy by writ of error under the foregoing Section has been abolished and appeal substituted. (Act of Jan. 31, 1928, c. 14, Secs. 1 and 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466; Title 28 U. S. C. Sec. 344 (a), Sec. 861 (a) Sec. 861 (b).

3.

State Statute Involved.

The statute of the State of Indiana, the validity of which is drawn in question, is Chapter 50, Indiana Acts 1933, page 388, known as "Gross Income Tax Act of 1933", as amended March 9, 1937, Indiana Acts 1937, Chapter 117, page 604, Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2601 *et seq.*

The pertinent provisions of the Act are set forth as follows:

Section 1 comprises definitions, including those of the terms "person" and "gross income", as follows:

"(a) When used in this act the term, "person" or the term "company", herein used interchangeably, means and includes any individual * * * fiduciary, trustee, executor * * * corporation * * * engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit * * *" (Sec. 64-2601, supra: Sec. 1, Ch. 117, Indiana Acts 1937, p. 604.)

(m) The term "gross income", except as hereinafter otherwise expressly provided, means the gross receipts of the taxpayer received as compensation for personal services, * * * and the gross receipts of the taxpayer received from trades, businesses, or commerce, * * * and the gross receipts received from the sale, transfer, or exchange, of property, tangible or intangible, real or personal, including the sale of capital assets * * * damages, or judgments, and all receipts received by reason of the investment of capital, including but not in limitation thereof, interest, discounts, rentals, royalties, dividends, fees, commissions, and receipts received from the surrender, sale, transfer, exchange, redemption of, or distribution upon, stock of corporations or associations, and all other receipts of any kind or character received from any source whatsoever, and without any deductions on account of the return of capital invested, the cost of the property sold, the cost of materials used, labor cost, interest, discount, or commissions paid or credited, or any other expense whatsoever paid or credited, and without any deductions on account of losses, and without any other deductions of any kind or character: Provided, however, * * *"

(Here follow certain exceptions not pertinent to this case.) (Sec. 64-2601, supra; Sec. 1, Ch. 117, Indiana Acts 1937, p. 606, 607.)

Section 2 describes the general scope of the Act, as follows:

> "Sec. 2. There is hereby imposed a tax upon the receipt of gross income, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the receipt of the entire gross income of all persons resident and/or domiciled in the State of Indiana, except as herein otherwise provided; and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana, of all persons who are not residents of the State of Indiana, and shall be in addition to all other taxes now or hereafter imposed with respect to particular privileges, occupations, and/or activities. Said tax shall apply to, and shall be levied and collected upon, the receipt of all gross income received on or after the 1st day of May, 1933, with such exceptions and limitations as may be hereinafter provided." (Sec. 2, Ch. 117, Indiana Acts 1937, p. 611; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2602.)

Section 3 contains the specific imposition of the tax upon different types of gross income or receipts and specifies the rates applicable thereto. The provisions of Section 3 pertinent to this case are as follows:

> "Sec. 3. The tax upon the receipt of gross income hereby provided for, shall be measured by the amount or volume of such gross income and shall be imposed at the following rates:
>
> "'(f) With respect to that part of the gross income of every person which is received from any source not enumerated in subsections (a) to (e), inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal services . . . all funds received from

the investment of capital, and all receipts received from any source whatsoever, the tax shall be equal to one per cent of such part of the gross income." (Sec. 3, Ch. 117, Indiana Acts 1937, p. 611, 613; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2603.)

(Note: Subsections (a) to (e), inclusive, provide, respectively, for a tax of one-fourth of one per cent on gross receipts from wholesale sales, display advertising, and one per cent on retail sales, utility service and banking or loan business.)

Section 5 provides for a deduction or exemption of $1000 annually from the gross income of each taxpayer, except retailers, whose deduction is $3000. (Sec. 5, Ch. 117, Indiana Acts 1937, p. 614.)

Section 6 is a disclaimer of intention to tax receipts derived from interstate commerce, designed to preserve the constitutionality of the Act, and reads as follows:

"Sec. 6. There shall be excepted from the gross income taxable under this act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent of which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America * * *." (Sec. 6, Ch. 117, Indiana Acts 1937, p. 615; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1937, Sec. 64-2606.)

Subsection (c) of Section 8 provides as follows:

"(c) Trustees of trust estates, created by will, by contract, by declaration of trust, or by implication of law, shall make returns covering all gross income received by the trust in accordance with such provisions of this act as apply to individuals and other tax-

payers. Only one deduction as provided in section 5 may be taken on such return, regardless of the number of beneficiaries of the trust." (Sec. 8 (c), Ch. 117, Indiana Acts 1937, p. 619; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1943, Sec. 64-2608.)

This Act contains provisions for collection of the tax, penalties for delinquency, the right to command the sheriff by warrant to levy upon the property of the taxpayer, and to enjoin a delinquent taxpayer from continuing in business, and other remedies, both civil and criminal, to enforce collection of the tax. (Sec. 13, Ch. 117, Indiana Acts 1937, p. 628-631; Burns Indiana Statutes Annotated 1933, Cumulative Pocket Supplement 1943, Sec. 64-2613.)

Regulations, Gross Income Tax Division.

ISSUED APRIL 15, 1940.

The pertinent Regulations of the Gross Income Tax Division of Indiana, are as follows:

"Regulation 3900. Interstate Commerce. (The first paragraph recites the provisions of Section 6 (a) of the Gross Income Tax Act, supra, excepting interstate commerce transactions from the purview of the Act.)

"The Department does not include herein any specific rulings on interstate commerce since such transactions involve many technical features, and court decisions vary in their determinations of its necessary elements. Therefore, each question involving interstate commerce must be submitted to the Department and will be considered on its individual merits and the Department herein reserves the right to adjudicate in every case whether or not there exist sufficient elements of interstate commerce to exempt from tax the receipts of any particular transaction.

"Whenever any taxpayer considers any of his receipts to be exempt from gross income tax because of the immunity of an interstate commerce transaction, he will be required to submit all of the facts * * * and such other relevant data as may be required by the Department.

"All taxpayers who are required to file gross income tax returns must include thereon all receipts derived from interstate commerce transactions even though such receipts are not taxable. Proper deductions may then be made on the return for non-taxable receipts.

"The Department will not interpret hypothetical questions involving interstate commerce." (Official Regulations 1940, Article 39, p. 79.)

INTANGIBLES.

Regulation 1212 is merely declaratory of the law as provided in the Act (Section 1 (m), supra.) and is as follows:

"Regulation 1212. Other Intangibles. Gross receipts from the sale of intangible property are taxable at the rate of 1%. The term intangible property includes notes, stocks in either foreign or domestic corporations bonds, debentures, * * * and any and all other intangibles capable of being transferred, acquired or sold. The physical situs of the intangibles shall have no bearing upon the taxability of the receipts from the sale or transfer thereof. * * *" (Official Regulations 1940, Reg. 1212, Article 12, p. 21.)

DEFINITIONS.

Regulation 100 is merely declaratory of the law as provided in the Act, defining the word "person" (Section 1 (a) of the Act, supra.) and is as follows:

"Regulation 100. PERSON and TAXPAYER are synonomous and taxable persons are those defined herein who are within the qualifications of Reg. 101.

"PERSON includes any 1. Individual—5. Fiduciary

—6. Trustee—28. Estate—29. Trust * * * (Sec. 1 (a).)".

Out-of-State Sources of Income

"Rule 7—Sales of Intangible Assets. Persons resident and/or domiciled in Indiana will be required to report for taxation all proceeds from the sale of intangible property where the legal situs of such property is in Indiana, even though sale is made outside the state. * * * This will also include all receipts of persons resident and/or domiciled in Indiana derived from outright sales of securities or from marginal stock transactions negotiated through brokers situated outside the state. The legal situs of all intangibles is presumed to be the domicile of the owner. * * *" (Official Regulations 1940, Reg. 3500, Article 35, Rule 7, p. 72.)

4.

The Opinion Below.

The opinion of the Supreme Court of Indiana and judgment of said Court, reversing the judgment of the trial court, rendered by Hon. Curtis G. Shake, Associate Judge, is set out in full as Appendix A hereto. There was no dissenting opinion. The opinion in the case is not yet officially reported, but is shown in 51 N. E. (2d) 6; also R. 66, App. 152.

5.

Finality of the Judgment.

Under the established practice of Indiana, the judgment of the Supreme Court of Indiana in an appealed case consists of the order made at the close of the deciding opinion. The Clerk makes a minute of the decision and order, which is signed by the Chief Justice, and no separate or other judgment is entered. The judgment so made when

the case is decided stands for sixty days and then becomes final, unless a petition for rehearing has been filed. If a petition for rehearing is filed, the judgment of the Court becomes final when the rehearing is denied. The controlling provisions of the Constitution and statute are:

> "The Supreme Court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such case, and the decision of the Court thereon." (Constitution of Indiana, Article 7, Section 5.)
>
> "When any cause is determined in the Supreme Court, the Clerk shall forthwith notify the clerk of the court below that it is determined, and whether reversed or affirmed in whole or in part, or dismissed. At any time within sixty (60) days after such determination, either party may file a petition for a rehearing; if not so filed the decision and instructions of the Supreme Court shall be certified to the court below, unless otherwise ordered by the court. (Acts 1881 (Spec. Sess.) Ch. 38, Sec. 650, p. 240; Burns Ind. Stat. Ann. 1933, Sec. 2-3236.)

In this case the deciding order, which became the final judgment when rehearing was denied, found at the end of the Supreme Court's opinion, reads:

> "The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant." (R. 74), 51 N. E. (2d) 6, 8.

The decision in this case was rendered on October 25, 1943. Petition for rehearing was filed November 13, 1943. Rehearing was denied on November 22, 1943. (R. 83).

This is the final judgment from which the appeal is properly taken, and from the date of which, November 22, 1943, the time for making the application for appeal began to run. This is in accordance with a decision of the Su-

preme Court of the United States on an appeal from Indiana.

Citizens Bank of Michigan City, Ind. v. *Opperman*, 249 U. S. 448, 449.

The judgment is final in that it completely determines the controversy, leaving nothing to be done except the ministerial act of enforcement. The judgment denies relief to appellant and orders a reversal of the judgment of the trial court and an entry of judgment for the appellee in accordance with the opinion. The judgment appealed from is final within the meaning of the Judicial Code, Sec. 237 (a), as amended February 13, 1925.

6.

Timely Application for Appeal.

Rehearing was denied November 22, 1943. The petition for appeal to the Supreme Court of the United States, accompanied by assignments of error, prayer for reversal, and this statement as to jurisdiction, as required by Rule 12 (1) of said Court, was on the 17th day of February, 1944, filed and presented to the Hon. Michael L. Fansler, Chief Justice of the Supreme Court of Indiana, and by him allowed on the *17th* day of February, 1944 (R. 89). Thus, the application for appeal was made within three months after the entry of final judgment, as provided in the Act of Feb. 13, 1925, c. 229, Sec. 8 (a), 43 Stat. 940, 28 U. S. C., Sec. 350.

7.

Origin of Federal Questions and Rulings of Courts Below.

The Gross Income Tax Act of 1933, as amended, was challenged by the appellant in both courts below as being repugnant to the Constitution of the United States, as applied

to the receipts of appellant from sales of his corporate stocks and bonds and deliveries thereof from his domicile or residence in Indiana by United States mail in interstate commerce through the New York Stock Exchange to persons resident of other states of the United States.

The complaint shows on its face that this is the only issue or ground alleged in the complaint for the recovery of the tax paid. The appellee joined issue thereon by his answer, and the case was submitted to the trial court on a stipulation of facts (R. 37) and certain letters between the parties. There was no dispute of fact, and the only issue in the case in either the trial court or the Supreme Court of Indiana was the question of law whether the application of the Gross Income Tax Act and the tax imposed thereby to the receipts of appellant from the interstate sales and deliveries of his stocks and bonds as alleged in his complaint and in the stipulation of facts was repugnant to Article I, Section 8 of the Constitution of the United States as constituting a regulation of and burden upon interstate commerce.

It is shown by the complaint, the answer, the stipulation of facts, the judgment of the trial court and the proceedings on appeal, that an actual controversy exists between the parties to the action, particularly in respect of said Federal question, which was raised at the times and in the stages in the proceedings and in the manner as follows:

(a) Trial Court. The Complaint Raised the Federal Question.

The appellant in his complaint filed in the trial court alleged (Third literary paragraph):

> "That the plaintiff on the 28th day of January or the 29th day of January, 1941, filed with and in the office of the Gross Income Tax Division of the State of Indiana, as required by law, a Fiduciary Gross In-

come Tax Return for said trust estate for the period beginning January 1, 1940, and ending December 31, 1940, and paid the total balance of tax indicated thereon in the sum of $760.74. That in and by said return the plaintiff reported and returned on line 3 thereof *under protest* the sum of $65,214.20 constituting and being the amount of gross receipts and total sale prices received by the plaintiff from the sale of intangible personal property consisting of corporate stocks and bonds of foreign corporations belonging to said trust estate and sold by the plaintiff in *interstate commerce* in the year 1940 *to residents of states other than the State of Indiana.*" (R. 10)

and (Fifth literary paragraph):

"That each and all of said sales of said property were made by the plaintiff through the New York Stock Exchange or in over the counter market in the city of New York, in the State of New York, to persons who were *residents of states other than the State of Indiana,* and that upon the sales of said property being effected through such stock exchange or in such over the counter market the plaintiff herein *shipped or mailed* by *United States mail from* the *City of Richmond, in the State of Indiana,* the *stock certificates* and/or the *bonds* hereinabove described *to the broker* representing this plaintiff *in said City of New York* for *delivery there* to the respective purchasers upon the respective sales so made, and that said *stock certificates* and said *bonds* were *delivered* to such respective purchasers thereof *in said State of New York* in execution, completion and consummation of the sales so made. That each and all of said *sales of said property* were *transactions in interstate commerce* and were and are *exempt from the payment* of *Gross Income Tax* to the State of Indiana and that *no gross income tax* was or is *due or payable* to the State of Indiana on account of the same by reason of the fact that all of said *transactions constituted* and were *interstate commerce* and that the gross receipts of the plaintiff therefrom were

receipts from business conducted in commerce between the State of Indiana and State of New York or other states of the United States, and the *gross income tax charged and collected* therefor or on account thereof *constituted a regulation of* and a *burden upon commerce* between the State of Indiana and other states of the United States *in conflict* with *Article I, Section 8* of the *Constitution* of the *United States*, and that the *State of Indiana* and the defendant herein was and is *prohibited from taxing* such *gross income or receipts* under the Gross Income Tax Act of 1933 and acts and laws amendatory thereof and supplemental thereto." (R. 12-13). (Original complaint not in italics)

The prayer of the complaint was general, demanding judgment for the amount of the tax so paid, $652.14, with interest from date of payment of said tax, and costs. (R. 14)

(b) Trial Court. The Answer Joined Issue on the Federal Question.

(Under the rules of procedure and practice in trial courts in Indiana, the party answering or replying to a pleading is required to state, without enlargement or elaboration, that he admits, denies or is without information as to the facts stated in each rhetorical paragraph or each designated part of such paragraph. A statement that the pleader is without information as to the facts alleged has the effect of a denial thereof. Rule 1-3, Supreme Court.)

The appellee filed answer as required by the rules alleging in part (Paragraph 3):

"In answer to the third literary paragraph of plaintiff's complaint, the defendant—admits that such return reflected a sum of $65,214.20, but this defendant is without knowledge as to the source of such income; and the defendant denies that such income was received from transactions in interstate commerce." (R. 17-18)

and (Paragraph 5):

> "The defendant is without knowledge of the truth or falsity of the allegations of the plaintiff in his fifth literary paragraph of complaint that the sales referred to were made in stock markets in New York, New York; that such sales were made to residents of states other than the State of Indiana; that such stocks and bonds were mailed from Richmond, Indiana, to plaintiff's broker in New York, New York; and that such stocks or bonds were delivered to purchasers in New York, New York. The *defendant denies* that the *sales* referred to *were sales in interstate commerce;* that such sales *were exempt from Indiana Gross Income Tax;* and that the *tax collected by* the *State of Indiana* constituted a *regulation and burden upon commerce* between the State of Indiana and other states of the United States, *in conflict with Article I, Section 8* of the *Constitution of the United States.*" (Our italics). (R. 19)

and (Paragraph 6):

> "The defendant admits—that a Gross Income Tax Return was filed by plaintiff for the year 1940; that such return was filed *under protest;* and that a tax in the amount of $652.14 was paid on an item listed on such return in the amount of $65,214.20, but the defendant is without knowledge of the source of such income to plaintiff; further defendant denies that the tax in the amount of $652.14 was improperly charged and collected from plaintiff by defendant." (Our italics). (R. 19-20)

and (Paragraph 8):

> "The defendant admits that the refund claimed by plaintiff has been refused by defendant and that no part of the tax paid by plaintiff to defendant for the year 1940 has been refunded by defendant; the defendant further admits that plaintiff has taken all steps required by law precedent to the bringing of this

action; but defendant denies that there is any amount due plaintiff by defendants." (R. 20)

(c) Trial Court. Judgment Passed on Federal Question.

While the judgment of the trial court was general in form, finding generally for the plaintiff (the appellant herein) and against the defendant (the appellee herein) that the allegations of the complaint were true and that the prayer of the complaint should be granted and plaintiff should recover from defendant the sum of $652.14 with interest thereon from date of payment of tax, January 29, 1941, and costs, and judgment was rendered and entered accordingly, with no special findings of fact or conclusions of law, the judgment necessarily passed upon said Federal question, as that was the only issue raised by the pleadings or on which the case was tried. (R. 22). (See Stipulation of Facts, R. 38-46)

(d) Trial Court. Motion for New Trial.

According to Indiana practice a motion for new trial was filed by appellee on the grounds that the decision of the court was not sustained by sufficient evidence and was contrary to law, which was overruled (R. 23-25).

(e) State Supreme Court. Federal Question Properly Presented.

An appeal was taken by appellee (defendant below) to the Supreme Court of Indiana, and the error assigned was the overruling of the motion for a new trial (R. 7). Under the practice in Indiana, the specific legal points relied upon are presented in appellant's brief under his "Propositions, Points and Authorities." Appellee's brief (Appellant's brief in the Supreme Court of Indiana), under this heading, presented the following:

"Proposition I:

"Indiana, Being the Domicile of the Seller, is Privileged to Tax."

"This proposition, together with its points and authorities, is in support of appellant's Assignment of Error No. 1, which is as follows:

'1. The trial court erred in overruling appellant's Motion for a New Trial, which motion contained the following specifications:

'1. The decision of the Court is not sustained by sufficient evidence.

'2. The decision of the Court is contrary to law.'" (R. 7).

"Point 1:

"The taxpayer is domiciled within Indiana and therefore Indiana has the power, and does impose an income tax upon him regardless of the source of the income. * * * (R. 57a).

"Point 3:

"Stock certificates and bonds are documents which are evidences of the number of shares of stock which the holder of them owns or the amount of money due a lender and do not in themselves constitute choses of action or property" (R. 58).

"Proposition III:

"The Prohibition of the Commerce Clause on Taxing Income from Tangible Property Does Not Apply to the Tax on Income When Intangibles are Involved * * * (R. 61.)

"Point 1:

"The vice of a tax measured by gross receipts (such as the Indiana Gross Income Tax) on tangible property levied by the jurisdiction from which the goods are shipped is that there is a possibility that the same type of tax could be levied by other jurisdictions and

thus tangible merchandise in interstate commerce might be subjected to a multiple tax burden not borne by local commerce.

J. D. Adams Mfg. Co. *v.* Storen (1938), 304 U. S. 307" (R. 62).

"Point 3:

"Intangible property can be the subject or measure of a tax in as many jurisdictions as give privileges or benefits to the owner of the intangible property. Appellee being domiciled in Indiana, the imposition of this tax is valid, there being *no constitutional objection thereto*" (R. 63). (Our italics.)

The appellee acknowledged and conceded that said Federal question was the only issue in the case, by stating in his brief on appeal to the Supreme Court of Indiana that:

"The appellee (appellant herein) contended that the amounts received by him and covered by the evidence constituted gross income derived from business conducted in commerce between the State of Indiana and other states of the United States to such an extent that the State of Indiana is prohibited from taxing such income by Section 8, Article I of the Constitution of the United States of America.

"The appellant (appellee herein) contended that the transactions reflected by the evidence did not constitute that type of commerce which the State of Indiana is prohibited from taxing under the provisions of the Commerce Clause of the Federal Constitution" (R. 57).

and further that:

"No constitutional objection can be successfully made against the taxation of the resident trustee involved here, measured by the gross receipts from his sales of intangibles—his sales of rights, the legal situs of which follow his person like the residence of an infant child follows that of his parents. An *intangible right* is *incapable of shipment* in *interstate commerce*,

therefore the ADAMS case and other cases of the same type involving shipments of corporeal objects in the channels of interstate trade can have no practical application here." (R. 63) (Our italics.)

(F) Highest State Court Decision in Favor of Validity of Statute.

The Supreme Court of Indiana treated the Federal question as properly raised and passed upon it. The Supreme Court ordered the judgment of the lower court reversed with instructions to enter judgment for the appellee, and without dissenting opinion, in its opinion stated:

"The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation: (Here follows Par. 5 the Stipulation of Facts in full) (R. 66). (Appendix, 153) "The question presented by this appeal is whether the appellee (appellant herein) is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933.—Section 6 of that act exempts so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States" (Appendix A, p. 157; R. 70; 51 N. E. (2d) 6, 7).

and the court further stated that:

"Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather a protection against such commerce being subjected to the

onerous burdens of multiple exactions" (Appendix A, p. 153; R. 71; 51 N. E. (2d) 6, 7).

and the Court further stated that:

"Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected. * * *

J. D. Adams Mfg. Co. *v.* Stôren (1938), 58 Sup. Ct. 913, 304 U. S. 307."

(Appendix A, p. 158, R. 71; 51 N. E. (2d) 6, 8), and the Court concluded, after citing and reviewing a number of decisions touching the commerce clause of the Constitution, that:

"The stipulated facts disclose a sufficient basis for imposing upon the appellee (appellant herein) a tax measured by the gross income derived from the sales therein described."—(Appendix A, p. 160; R. 74; 51 N. E. (2d) 6, 8).

The Supreme Court of Indiana in its opinion cites and purports to rely upon the following cases to demonstrate that the tax is not repugnant to the commerce clause of the Constitution of the United States:

J. D. Adams Mfg. Co. v. *Storen* (1938), 58 Sup. Ct. 913, 304 U. S. 307.

Dept. of the Treasury v. *Allied Mills, Inc.* (1942), 42 N. E. (2d) 34, affirmed by the United States Supreme Court Feb. 15, 1943, — U. S. —, 87 L. Ed. —, 63 Sup. Ct. 666.

O'Kane v. *State* (1940), 283 N. Y. 439, 28 N. E. (2d) 905.

Union Refrigerator Transit Co. v. *Kentucky* (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36.

Buck v. *Beach* (1906), 206 U. S. 392, 51 L. Ed. 1106, 27 Sup. Ct. 712, 11 Ann. Cas. 732.

Blodgett, Tax Commissioner of the State of Conn. v. *Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410.

Croop v. *Walton* (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386.

Miami Coal Co. v. *Fox, Treas.* (1932), 203 Ind. 99, 176 N. E. 11, 79 A. L. R. 333.

Holland Furnace Co. v. *Dept. of Treasury* (1943), — C. C. A. —, 133 F. (2d) 212.

Curry v. *McCanless* (1939), 307 U. S. 357, 83 L. E. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162.

Thus the Federal question was presented at the earliest opportunity in the trial court, was presented to, entertained by and decided by the Supreme Court, the highest court in the State of Indiana in which a decision in the suit could be had, and that decision was in favor of the validity of the State statute.

8.

Federal Questions Necessarily Decided.

Appellant in both State Courts claimed exemption from the tax on certain types of gross receipts on the sole ground that the exaction of the tax on such gross receipts was in violation of specified provisions of the Federal Constitution.

By judgment of the trial court, appellant was exempted from the tax, the judgment being for the recovery of the

amount of tax paid on the disputed types of gross receipts. By the judgment of the State Supreme Court appellant is compelled to pay the tax on such gross receipts. It therefore appears affirmatively from the record that the Federal questions were presented for decision to the highest court of the State having jurisdiction, that its decision of the Federal questions was necessary to the determination of the cause, that the questions were actually decided, and that the judgment as rendered could not have been given without deciding them.

Lynch v. *New York ex rel.*, 293 U. S. 52, 54.

9.

Highest State Court Is the Supreme Court.

Under the Constitution of Indiana, the jurisdictional power of the State is vested in a Supreme Court, and it is the court of last resort within the State in which a decision could be had. There is no other or higher court in Indiana to which the questions stated in the assignment of errors could be presented, or by which they could be decided.

Constitution of Indiana, Article 7, Sec. 1;
Ex Parte France, 176 Ind. 72, 80-81;
Curless v. *Watson*, 180 Ind. 86, 92-93.

10.

Federal Questions Are Substantial.

The questions involved are substantial because the ultimate decision thereon in this appeal to the Supreme Court of the United States will determine the validity of the Gross Income Tax Act of 1933, as amended, of the State of Indiana, as applied to the gross receipts of appellant from sales of intangibles, corporate stocks and bonds, sold

and delivered in transactions interstate in the year 1940, as well as subsequent and future years, and will determine the validity of the judgment of the trial court in favor of the appellant for the recovery of said large amount of money paid under protest to the appellee as taxes under said Act imposed and collected from appellant by appellee on account of such gross receipts derived by appellant from commerce between the State of Indiana and the State of New York or other states of the United States; and said questions are substantial because corporate stocks and bonds are owned and held generally throughout the State of Indiana by the citizens thereof and by them from time to time sold and delivered in interstate commerce, and, like the case of

J. D. Adams Mfg. Co. v. *Storen*, 304 U. S. 307, *supra*,

the leading Indiana case which by declaratory judgment decided the invalidity and unconstitutionality of said Act as applied to sales interstate or to foreign countries of manufactured goods or commodities, will establish a precedent as to the validity of said Act as applied to sales interstate of such intangibles.

Practically all securities sold by appellant in handling the investments of said trust are sold through the New York Stock Exchange, and many securities can be sold no other way, listed securities in particular. As was well said in the case of

General Motors Acceptance Corporation v. *Huron Finance Corporation et al.*, (1935), 262 N. W. 195,

in holding that stocks and bonds are proper subjects of interstate commerce, the transactions in such personal property from one state to another "for the purpose of barter and sale and delivery constitutes not only commerce among the states of this country, but constitutes a *very*

large and important element of such commerce." (Our Italics.)

However, the volume of interstate commerce transactions is immaterial, as was held in the case of

Electric Bond & Share Co. v. *Securities and Exchange Commission* (1937), 92 Fed. (2d) 580, 588.

The imposition of the tax upon such gross receipts of appellant at the rate of one per cent involves a substantial tax liability each year, and precludes the making of many sales in commerce between the State of Indiana and other states not only by appellant but by many other residents of Indiana, thereby reducing the volume of such commerce and thwarting and hampering the same contrary to and in violation of Article I, Section 8 of the Federal Constitution. A larger tax rate could and would destroy all such commerce.

The imposition of this tax upon the gross receipts of appellant derived from interstate commerce is a clear invasion of a substantial right of appellant under said commerce clause. It has always been held by the Supreme Court of the United States that a *tax upon gross receipts* from interstate and foreign commerce *is a tax upon the commerce itself* and is forbidden by the Constitution. The following cases support appellant's position on this question:

J. D. Adams Mfg. Co. v. *Storen, Chief Administrative Officer, et al.* (1938), 304 U. S. 307, 58 Sup. Ct. 913.

Allied Mills, Inc. v. *Department of Treasury* (1943), 63 Sup. Ct. 666, affirming —— Ind. ——, 42 N. E. (2d) 34 (1942).

Gwin, White & Prince, Inc. v. *Henneford, et al.* (1938), 59 Sup. Ct. 325, 305 U. S. 434.

In Re Globe Varnish Co. (1940), 114 Fed. (2d) 916, 312 U. S. 690.

Galveston, H. & S. A. Ry. Co. v. *Texas* (1907), 210 U. S. 217, 28 Sup. Ct. 638.

Crew Levick Co. v. *Commonwealth of Pennsylvania* (1917), 245 U. S. 292, 38 Sup Ct. 126.

Stockard v. *Morgan* (1901), 185 U. S. 27, 22 Sup. Ct. 576.

Postal Telegraph Cable Co. v. *Adams* (1895), 155 U. S. 688, 695, 15 Sup. Ct. 268.

State Freight Tax (1872), 15 Wall. 232, 277, (21 L. Ed. 146).

United States v. *Ohio Oil Company* (1913), 234 U. S. 548.

Pennsylvania R. Co. v. *Clark* (1915), 238 U. S. 456.

Pennsylvania R. Co. v. *Soman Shaft Coal Co.* (1916), 242 U. S. 120.

Texas & N. O. R. Co. v. *Sabine Tram Co.* (1913), 227 U. S. 111.

Dahnke-Walker Milling Co. v. *Bondurant* (1921), 257 U. S. 282.

Sioux Remedy Co. v. *Cope* (1914), 235 U. S. 197.

Furst v. *Brewster*, 51 Sup. Ct. 295.

Electric Bond & Share Co. v. *Securities and Exchange Commission* (1937), 92 Fed. (2d) 580, 588.

Andrews v. *Montgomery-Ward & Co.* (1939), 30 F. Supp. 380.

McGoldrick, etc. v. *Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 60 Sup. Ct. 388, 394.

General Motors Acceptance Corp v. *Huron Finance Corp., et al.* (1935), 262 N. W. 195.

Also: 36 Illinois Law Review 727-746 (March 1942; see pages 738-9).

And the following cases support appellant's proposition that intangibles, corporate stocks and bonds, are subjects of commerce and interstate commerce and transportation, and that interstate sales and deliveries thereof are pro-

tected by the commerce clause of the Federal Constitution against the burden of state taxation:

Oklahoma-Texas Trust v. *Securities and Exchange Commission* (1939), 100 Fed. (2d) 888.

Parey v. *Bache* (1942), 125 Fed. (2d) 493.

General Motors Acceptance Corp. v. *Huron Finance Corp, et al.* (1935), 262 N. W. 195, supra.

Electric Bond & Share Co., et al. v. *Securities and Exchange Commission, et al.* (1937), 92 Fed. (2d) 580, 589, 590, supra, affirmed by U. S. Supreme Court, 303 U. S. 419, 58 Sup. Ct. 678.

O'Kane v. *State* (1940), 28 N. E. (2d) 905.

Securities and Exchange Commission v. *Torr* (1936), 15 F. Supp. 315.

Securities and Exchange Commission v. *Bailey* (1941), 41 F. Supp. 647.

Securities and Exchange Commission v. *Payne* (1940), 35 F. Supp. 873.

Securities and Exchange Commission v. *Tung Corp.* (1940), 32 F. Supp. 371.

Jones v. *Securities and Exchange Commission* (1935), 79 Fed. (2d) 617, 619.

Bracey v. *Darst* (D. C.) (1914), 218 Fed. 482.

Industrial Acceptance Corp. v. *Haering* (1929), 253 Ill. App. 97.

Champion v. *Ames* (1903), 23 Sup. Ct. 321.

The question therefore of whether the Gross Income Tax Act of 1933, as amended, can validly be applied to the receipts of appellant from such sales of intangibles, corporate stocks and bonds, in interstate commerce, does involve a substantial Federal question.

The opinion and judgment of the Supreme Court of Indiana could not have been rendered or entered without denying to appellant all of the rights asserted by him under

the constitutional provisions relied upon, and said opinion and judgment can not rest upon any independent non-Federal grounds.

It is submitted that the judgment definitely and clearly draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Sec. 237 (a) of the Judicial Code as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Dated this 17th day of February, 1944.

Respectfully submitted,

(Signed) GATH P. FREEMAN,
Attorney for Appellant, Gath P. Freeman, Trustee under the Will and of the Estate of Henry C. Starr, Deceased.

APPENDIX A.

THE STATE OF INDIANA,

IN THE SUPREME COURT, MAY TERM, 1943.

On the 25th day of October, 1943, being the 131st Judicial day of said May Term, 1943.

No. 27881.

HON. H. NATHAN SWAIM, Chief Justice; HON. MICHAEL L. FANSLER, HON. CURTIS G. SHAKE, HON. MART J. O'MALLEY, HON. FRANK N. RICHMAN, Associate Judges.

In the case of

GILBERT K. HEWIT, Director of Gross Income Tax Division, Department of Treasury, State of Indiana, *Appellant*,

vs.

GATH P. FREEMAN, Trustee under the will and of the Estate of Henry C. Starr, Deceased.

Appealed from the Wayne Circuit Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

SHAKE, *J.*:

During 1940 the appellee, who was domiciled in Indiana, paid, under protest, Indiana Gross Income Taxes calculated on proceeds derived from the sale of corporate stocks and bonds of foreign corporations. Subsequently, the appellee brought this action and recovered the amount of taxes so paid. The State has appealed from the overruling of its motion for a new trial, which asserted that the decision was contrary to law.

The evidence is not in dispute and the nature of the transactions here involved are disclosed by the following stipulation:

"5. The sales of the above described corporate stocks and bonds were twenty separate sales made from

time to time in the year 1940 for the respective sales prices as above set out and were made in the following manner: The trustee placed orders to sell from time to time of the several stocks and bonds above described and set out, with one Sherman J. Brown, a broker of Richmond, Indiana, who maintained and conducted a grain brokerage and a stock and bond brokerage business at and in said City of Richmond, Indiana, operating and maintaining at and in the office of said brokerage business a blackboard and telegraph wire service over private lines leased from the American Telephone and Telegraph Company and telegraph operators and clerks who received by telegraph over said wire service the market transactions as the same occurred daily on the New York Stock Exchange and the Chicago Stock Exchange and who posted the same upon said blackboard as received through such telegraph service, all in the manner as usually and customarily done and conducted in such brokerage offices. Said telegraph wire service was connected with the brokerage office of Fenner and Beane, brokers at and in the City of New York in the State of New York, who furnished the markets and market information of sales and transactions on the New York Stock Exchange as the same occurred over said telegraph wire service to said brokerage office of said Sherman J. Brown in said City of Richmond, Indiana, said Fenner and Beane being members of said New York Stock Exchange; said Sherman J. Brown was not and is not a member of said New York Stock Exchange and could not himself make sales on said Exchange. Upon and at the time of placing said sales orders by the trustee with said Sherman J. Brown, as such broker in said City of Richmond, Indiana, the trustee knew and intended that the same would be immediately communicated by said telegraph wire service to the office of Fenner and Beane at and in said City of New York, New York, and by them placed and offered on said New York Stock Exchange. Upon receiving such separate sales orders from time to time Fenner and Beane offered the stocks or bonds accord-

ing to the sales orders of the trustee for sale on said New York Stock Exchange at the prices specified by the trustee in his separate sales orders, and upon acceptance of any sales offer on said New York Stock Exchange by some other broker representing a purchaser, Fenner and Beane notified said Sherman J. Brown at Richmond, Indiana over said telegraph wire service of the sale, and thereupon said Sherman J. Brown notified the trustee of the sale and to deliver the stock certificates or bonds so sold. Thereupon the trustee delivered to said Sherman J. Brown in Richmond, Indiana the stock certificates or bonds so sold, who mailed the same by United States mail to the office of Fenner and Beane at and in the City of New York. Upon receipt by Fenner and Beane in New York City of the stock certificates or bonds so sold, they delivered the same in said City of New York to the broker representing the purchaser of the stocks or bonds so sold, and thereupon the broker representing the purchaser paid the purchase price to Fenner and Beane at and in the City of New York, upon delivery of the securities, and thereupon Fenner and Beane transmitted or remitted the proceeds of such sale by check, less their commission, cost of revenue stamps, postage and any other expenses of sale, by United States Mail to the said Sherman J. Brown at Richmond, Indiana, who delivered the amount thereof to the trustee less deduction of his broker's commission. Neither said Sherman J. Brown nor said Fenner and Beane acted as principal in any of said sales and neither of them took or had any title in or to any of such corporate stocks or the certificates therefor or any of said bonds, but both said Sherman J. Brown and said Fenner and Beane acted solely and only as brokers for said trustee upon and for commissions, the commissions of Fenner and Beane being authorized and approved by said New York Stock Exchange according to the rules and regulations thereof, and neither of them had any interest in any of said sales or property except as a broker to procure sales thereof on or for commissions. All of said sales were handled

in the usual and customary way of sales of intangibles through said New York Stock Exchange, and the court may take judicial notice of the manner and method of sales of securities on or through said New York Stock Exchange and the rules and regulations and laws governing sales of securities on or through said New York Stock Exchange. All persons purchasing the intangibles set out above were non-residents of the State of Indiana; however, the plaintiff at the time of sale did not know, nor was he acquainted with the ultimate purchasers of the intangibles, nor did the trustee make it a requirement of the sale that the bonds and stocks be sold only to persons, firms, or corporations resident in states other than Indiana."

The question presented by this appeal is whether the appellee is taxable on the proceeds of the above described sales under the Indiana Gross Income Tax Act of 1933. § 64-2601 et seq., Burns' 1933, § 15981 et seq., Baldwin's 1934. Section 6 of that act exempts "So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States."

Much of the confusion relating to the matter before us arises out of the misconception that the federal Constitution prohibits the imposition of any state tax upon subjects of interstate commerce. This assumption is untrue. The immunity which interstate commerce enjoys is not a cloak to insulate it against being required to bear its proportionate share of expenses of local government; but rather a protection against such commerce being subjected to the onerous burdens of multiple exactions. "The validity of State regulation under the commerce clause is to be determined by the balancing of two considerations: that State government shall be able to derive revenue for its support, and that commerce among the States shall be unfettered by

provincial impediments. Stated conversely, interstate commerce must bear its share of the tax burden along with intrastate commerce, but the states may not exact of interstate commerce a toll heavier than that which intrastate commerce is liable to pay.

O'Kane *v.* State (1940), 283 N. Y. 439, 28 N. E. (2nd) 905.

Recognizing that tangible property is capable of acquiring a situs of its own, which may be different from that of the domicile of its owner, the Supreme Court of the United States has held that as to transactions relating to such property a tax of the character here involved may be levied by the state of the buyer, but not by that of the seller. By adhering to this formula the possibility of burdening transactions in interstate commerce with multiple taxes is avoided and, at the same time, the right of the states to impose sustaining taxes is protected.

Dept. of the Treasury *v.* Allied Mills, Inc. (1942), — Ind. —, 42 N. E. (2nd) 34

affirmed by the United States Supreme Court February 15, 1943,—U. S.,—87 L. Ed. —, 63 Sup. Ct. 666.

J. D. Adams Mfg. Co. *v.* Storen (1938), 58 Sup. Ct. 913, 304 U. S. 307.

The situs of intangible property, such as stocks and bonds, is not of a transitory character. As to assets of this type there has been applied the rule of "mobilia sequuntur personam"—the situs of the property is the domicile of the owner. This doctrine maintains generally in the absence of a statute or of peculiar facts forcing a different conclusion.

Cooley, Taxation (4th Ed.), § 440.

Union Refrigerator Transit Co. *v.* Kentucky (1905), 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. 36.

Buck *v.* Beach (1906), 206 U. S. 392, 51 L. Ed. 150, 26 Sup. Ct. 36.

Blodgett, Tax Commissioner of the State of Conn. *v.* Silberman (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410.

Croop *v.* Walton (1927), 199 Ind. 262, 157 N. E. 275, 53 A. L. R. 1386.

No such statute has been called to our attention and no such facts are disclosed by the stipulation. It must, therefore, be concluded that the situs of the stocks and bonds sold by the appellee was in this state, where he was domiciled. For a discussion of the circumstances that may establish for intangible property a situs different from the domicile of the owner see

Miami Coal Co. *v.* Fox, Treas. (1932), 203 Ind. 69, 176 N. E. 11, 79 A. L. R. 333.

The appellee concedes that the law is as stated above, but he relies upon the proposition that the sale of said securities, in the manner described by the stipulation, constituted transactions in interstate commerce. He leans upon the circumstances that the offers of sale, the acceptance of the offers, the delivery of the certificates evidencing ownership and the remittance of the proceeds by the broker in New York to him in Richmond, Indiana, were effectuated by the facilities of interstate commerce. Having admitted the major premise, the appellee's contention must fail. If the situs of his securities was at the place of his Indiana domicile, it necessarily remained there until ownership passed to the purchasers. The activities of the appellee's agents in making the sales did not change the situs of his securities any more than they affected his domicile. That said activities incidentally involved interstate commerce is immaterial.

Holland Furnace Co. *v.* Dept. of Treasury (1943), — C. C. A. —, 133 F. (2nd) 212.

The stipulated facts disclose a sufficient basis for imposing upon the appellee a tax measured by the gross income derived from the sales therein described. Whether the

appellee's incidental activities in another jurisdiction might subject him to additional tax liabilities there is not before us; but even that contingency would not relieve him from the obligation he now seeks to avoid.

Curry *v.* McCanless (1939), 307 U. S. 357, 83 L. Ed. 1339, 59 Sup. Ct. 900, 123 A. L. R. 162.

O'Kane *v.* State, supra.

The judgment is reversed with directions to sustain the motion for a new trial and to enter judgment for appellant.